IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPEL**LATE JURISDICTION**

WRIT PETITION NO.5517/2005

Subhash Kakar @ Subiraj & Ors .. Petitioner.

Verus.

Mrs. Asha Bhosale .. Respondents.

Mr.Rajendra Pai with Mr. Faisal Sayyed i/b M.K. Ambalal for respondent.
Mr. K.A.Sampat for petitioner.

CORAM: SMT.N.N.MHATRE,J.

DATE : 12TH SEPTEMBER 2005.

P.C.

1. This petition challenges the order of the appellate court allowing the application filed by the respondent for framing of an additional issue. The issue framed is whether the defendants are liable to be evicted from the suit premises on the ground of denial of title of plaintiff as mentioned in para 2 of the written statement.

2. The respondent has filed a suit for injunction against petitioner on various ground. In the written statement the petitioner contended that the respondent did not have title to the property and therefore, can not

claim that she was the land lady of the property. It is contended by the respondent that the application was made before the trial court to frame additional issue, besides the ones which were already framed. This additional issue was in respect of denial of title of the plaintiff i.e. the respondent herein. It appears that the trial court did not frame such an issue. An appeal was filed and an application was moved before the appellate court that such an additional issue should be framed. This application has been allowed.

3. Learned counsel for the petitioner, by placing reliance on the Judgement of this Court in case of **Lena Pereira and others Vs.Mary Boracho and others reported in AIR 1992 Bombay 93 and in case of Bapubhai Papabhai Vs. Khairunnisa Abdul Kadar reported in 1992 Mh.L.J. submits** that unless **there is an amendment to the plaint such** additional issue cannot be framed and tried by the trial court. He also relies on the judgement in case of **Omprakash Gupta Versus Ranbir B.Goyal reported in (2002) 2 Supreme Court Cases 256.**

4. In my view the submissions raised by the learned counsel for the petitioners are not sustainable. The additional issue has been framed by the Appeal Court and

the trial court has been directed to try the issue. This does not mean that the decree would necessarily be passed on this issue. While deciding the issue the trial court will consider the effect of the respondent not amending the plaint. The trial court will also consider whether the issue can be answered in view of the judgements which have been cited before me. All these contentions are kept open. Besides this, the trial court will also consider the judgment reported in **AIR 1989 Supreme Court 2187 in the matter of Majati Subbarao versus P.V.K. Krishna Rao** cited by the learned counsel for respondent where, the Apex Court has considered a fact situation whether there was no amendment to the pleadings. The Apex Court has held that since the parties had full knowledge of the ground alleged, there could be no objection to frame the issue. All these judgements and other which may be cited before the trial court would be considered by the trial court while answering the additional issue after recording evidence. The appeal in any case is still pending.

5. In view of this the petition is dismissed.

6. No order as to cost.

7. Appellate court had directed the trial court to decide the issue by 30th August 2005 which date has been extended upto today.

8. The trial court to decide the issue by 31/12/2005.

9. All contentions of both the parties kept open including the question of limitation.

10 All applications filed before the trial court will be considered on their own merits.

11. The petitioner states that the cross examination of respondent has been closed on account of pendency of this Writ Petition. The trial court will permit cross examination of respondent if necessary.

(SMT.N.N.MHATRE,J)